

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 27, 2007 Session

CAROL ANN WAUGH v. TROY ALLEN WAUGH

**Direct Appeal from the Chancery Court for Williamson County
No. 31519 R.E. Lee Davies, Chancellor**

No. M2006-02154-COA-R3-CV - Filed on July 30, 2007

In this post-divorce case, the former wife challenges the trial court's dismissal of a contempt action she brought against her former husband for refusing to make a \$1,458 line of credit interest payment purportedly required by the trial court's previous *pendente lite* order. The trial court found that the *pendente lite* order did not require the former husband to pay accrued interest that was billed after the entry of the final divorce decree awarding the marital residence, along with its line of credit, to the former wife. The trial court thus dismissed the contempt proceedings because the former husband had complied with the *pendente lite* order. Finding no abuse of discretion, we concur in the trial court's judgment and award reasonable expenses, including attorney's fees, to the former husband under a provision of the parties' marital dissolution agreement. Affirmed and remanded for the calculation of reasonable expenses and entry of judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; and
Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which HOLLY M. KIRBY, J., and WALTER C. KURTZ, Sp. J., joined.

James G. Martin, III, and Rebecca K. McKelvey, Nashville, Tennessee, for the appellant, Carl Ann Waugh.

Helen Sfikas Rogers, Nashville, Tennessee, for the appellee Troy Allen Waugh.

OPINION

Carol Ann Waugh (Ms. Waugh) appeals the trial court's dismissal of the contempt proceedings she instituted against Troy Allen Waugh (Mr. Waugh) to recover a \$1,458.73 interest payment purportedly due under a *pendente lite* order of November 23, 2005. Ms. Waugh filed the petition for contempt in June of 2006, after the trial court had already

entered the final decree of divorce and divided their six million dollar (\$6,000,000) marital estate.¹

The *pendente lite* order of November 23, 2005, stated, in pertinent part, that:

[w]ith respect to Mr. Waugh's Motion . . . the Court . . . determined that pending the final hearing in this cause, Mr. Waugh shall continue to pay the monthly interest on the line of credit secured by a lien on the marital residence.

Mr. Waugh had the monthly interest payments drafted from his account as they came due and made his final interest payment on March 10, 2006, just seven days before the entry of the final decree of divorce. The parties executed a Marital Dissolution Agreement (MDA) on March 16, 2006, and the trial court entered the final decree of divorce on March 17, 2006. The decree provided that:

[t]he marital residence . . . shall be, and is hereby, divested from Mr. Waugh and vested absolutely in Mrs. Waugh Mrs. Waugh shall be solely and separately responsible for all debts and liabilities associated with the property and shall indemnify and hold Mr. Waugh harmless from any such debt or liability.

The billing cycle of the lending institution apparently operated on a one-month delay, so that Mr. Waugh's March 10, 2006, payment covered interest that had accrued up to February 20, 2006. Ms. Waugh paid the next bill on April 10, 2006. That bill represented interest accruing from February 20, 2006, to March 23, 2006. Ms. Waugh asserts that Mr. Waugh violated the *pendente lite* order when he refused to pay \$1,458.73, a prorated amount representing the accrued interest from February 20, 2006, to March 17, 2006, the date of their divorce.

Ms. Waugh filed a petition for contempt on June 6, 2006, to which Mr. Waugh responded with a motion to dismiss. The trial court granted Mr. Waugh's motion to dismiss by order entered September 5, 2006, and found that:

Mr. Waugh was required to make payments on the line of credit as they became due as the parties' [sic] had always done, that at the time the parties signed the Marital Dissolution Agreement, Mr. Waugh had paid his obligation, and that the Marital Dissolution Agreement merged the obligation under the

¹As indicated by Ms. Waugh's attorney at oral argument, the size of the marital estate approximated six million dollars.

Pendente Lite Order with the result that Mr. Waugh's [sic] had no further obligation [to] make payments on the line of credit inasmuch as no further payment was due until the tenth of the following month.

Ms. Waugh filed her notice of appeal on October 5, 2006. On appeal, she requests a remand to the trial court for an award of attorney's fees and the entry of an order requiring Mr. Waugh to pay the accrued interest. Mr. Waugh requests attorney's fees and costs (associated both with the trial court proceedings and on appeal), as well as damages for a frivolous appeal. He specifically cites to paragraph 35 of the MDA, which states that:

[i]n the event it becomes reasonably necessary for either party to institute or defend legal proceedings relating to the enforcement of any provision of this Agreement, the prevailing party shall also be entitled to a judgment for reasonable expenses, including attorney's fees, incurred in connection with such proceedings.

Issues Presented and Standard of Review

The parties raise several issues on appeal, as restated below. Ms. Waugh presents the following issue:

- (1) Whether the trial court erred in determining that the parties' Marital Dissolution Agreement and the subsequent Final Decree of Divorce relieved [Mr. Waugh] of his obligations under a *pendente lite* order to make certain interest payments on a line of credit secured by the parties' residence.

Mr. Waugh, on the other hand, phrases the issues in this manner:

- (1) Whether the trial court's use of the term "merged" was harmless error and will not prejudice Ms. Waugh and/or alter the final judgment of the trial court;
- (2) Whether the parties' executed marital dissolution agreement was a valid, enforceable contract that cannot be modified without express consent of the parties;
- (3) Whether [Ms. Waugh's] appeal is a frivolous appeal; and

- (4) Whether [Mr. Waugh] is entitled to reasonable attorney's fees, expenses and costs in this entire matter, including this appeal.

Like most other civil contempt actions, this one aimed to enforce private rights. *See Overnite Transp. Co. v. Teamsters Local Union No. 480*, 172 S.W.3d 507, 510 (Tenn. 2005); *Robinson v. Air Draulics Eng'g Co.*, 377 S.W.2d 908, 912 (Tenn. 1964). The Tennessee Code empowers courts to find an individual in contempt when he or she willfully refuses to perform some act mandated by court order. *See* Tenn. Code Ann. §29-9-102 (2000). In this case, Ms. Waugh contends Mr. Waugh willfully refused to make an interest payment as required by the trial court's *pendente lite* order of November 23, 2005.

“Determining whether its order has been followed is the prerogative of the trial court, and is uniquely within the trial court's discretion.” *Sherrod v. Wix*, 849 S.W.2d 780, 786 (Tenn. Ct. App. 1992)(citations omitted). In reviewing the trial court's decision not to hold Mr. Waugh in civil contempt of court, we must determine whether the trial court abused its discretion. *See United Color Lab & Digital Imaging, Inc. v. United Studios*, No. W2005-00133-COA-R3-CV, 2006 WL 694645, at *4 (Tenn. Ct. App. Mar. 21, 2006)(*no perm. app. filed*)(citing *Hawk v. Hawk*, 855 S.W.2d 573, 583 (Tenn. 1993); *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 222 (Tenn. Ct. App. 1999)). If reasonable judicial minds can differ regarding the soundness of a trial court's discretionary decision, then an appellate court should permit the decision to stand. *See Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 708–09 (Tenn. Ct. App. 1999).

Analysis

Before determining whether an abuse of discretion occurred in this matter, we must first identify the substance of the trial court's action. It appears necessary to address the trial court's September 2006 order, as the parties' treatment of it has yielded certain issues where, as we perceive it, there are none. The trial court's order provided as follows:

Mr. Waugh was required to make payments on the line of credit as they became due as the parties' [sic] had always done, that at the time the parties signed the Marital Dissolution Agreement, Mr. Waugh had paid his obligation, and that the Marital Dissolution Agreement merged the obligation under the *Pendente Lite* Order with the result that Mr. Waugh's [sic] had no further obligation [to] make payments on the line of credit inasmuch as no further payment was due until the tenth of the following month.

On appeal, Ms. Waugh questions whether “the trial court erred in determining that the parties' Marital Dissolution Agreement and the subsequent Final Decree of Divorce relieved

[Mr. Waugh] of his obligations under a *pendente lite* order to make certain interest payments on a line of credit secured by the parties' residence." The above order does not provide that the MDA relieved Mr. Waugh of these purportedly unfulfilled obligations. Rather, the trial court ruled that Mr. Waugh fulfilled the obligations as set forth in the *pendente lite* order and that, pursuant to the MDA and divorce decree, the obligation to pay the April 2006 bill properly shifted to Ms. Waugh. In addition, the trial court's use of the term "merged" in its order has instigated a flurry of arguments about the application of the doctrine of merger² to this case. The text of the order, however, indicates that the trial court did not rely on this doctrine for its ruling. The court interpreted Mr. Waugh's obligation as set forth in the order and concluded that he had fulfilled his obligation thereunder. Notwithstanding the unfortunate use of the term "merged," the order clearly states the trial court's determination.

There is no dispute that Mr. Waugh paid the interest each month in a timely manner, as it came due. There is also no dispute that Ms. Waugh assumed all debts and liabilities associated with the home on the date of the entry of the final decree of divorce. Thus, the relevant question is whether the *pendente lite* order obligated Mr. Waugh to pay all interest that accrued up to the entry of the divorce decree or whether it obligated him to make the payments, when due and payable, up to the time of divorce. The determinative action of the trial court in this case is its interpretation of this obligation as set forth in its previous *pendente lite* order.

We find no abuse of discretion because the trial court's interpretation of its previous *pendente lite* order comports with the plain meaning of its text. The court's *pendente lite* order required Mr. Waugh to pay the interest *as it came due* up to the date of divorce. In particular, the terms "continue" and "monthly" support this conclusion: Mr. Waugh was to

²Regarding the doctrine of merger, this Court recently noted:

A marital dissolution agreement is a contract between parties contemplating divorce. *Gray v. Estate of Gray*, 993 S.W.2d 59, 63 (Tenn. Ct. App. 1998). After a divorce decree becomes final, a marital dissolution agreement becomes merged into the decree as to matters of child support and alimony, and the trial court has continuing statutory power to modify the decree as to those matters when justified by changed circumstances. *Penland v. Penland*, 521 S.W.2d 222, 224 (Tenn. 1975). To the extent that a marital dissolution agreement is an agreement as to distribution of marital property, it does not lose its contractual nature by merging into the decree of divorce and is not subject to later modification by the court. *Towner v. Towner*, 858 S.W.2d 888 (Tenn. 1993).

Hannahan v. Hannahan, No. E2006-02188-COA-R3-CV, 2007 WL 1555839, at *2 (Tenn. Ct. App. May 30, 2007).

continue making payments as before, and those payments occurred on a monthly basis. Nothing in the text of the *pendente lite* order invites a different reading.

Citing the *pendente lite* order, Ms. Waugh relies on the phrase “pending the final hearing in this cause” as proof that Mr. Waugh was liable for all interest accruing up to the hearing date. We disagree and note that the phrase also supports the trial court’s - - and this Court’s - - conclusion that Mr. Waugh’s obligation to pay the monthly interest bills lasted until that time. In other words, the temporal limitation applied to bill payment obligations, not to Mr. Waugh’s liability for accrued interest. Although there existed accrued and unpaid interest at the time of the divorce hearing, the payment for that interest was not yet due and thus not the responsibility of Mr. Waugh. Mr. Waugh was obligated to pay the interest bills up to the entry of the final divorce decree. This he did, and in a timely fashion. Any bills issued after the divorce were Ms. Waugh’s to pay. We see no error in the trial court’s interpretation of its own *pendente lite* order. Where there was no violation of the order, there could be no finding of contempt on that basis. We see no reason to address the doctrine of merger or the nature of the MDA further.

Although we do not view this appeal as frivolous, we do find an award of attorney’s fees, both for the contempt proceedings in the trial court and for this appeal, to be appropriate pursuant to paragraph 35 of the MDA. Accordingly, we remand to the trial court for the calculation of Mr. Waugh’s reasonable expenses, including attorney’s fees, and an entry of judgment.

Conclusion

We hold that the trial court did not abuse its discretion when it dismissed contempt proceedings founded upon a previous *pendente lite* order requiring Mr. Waugh to make the monthly line of credit interest payments until the entry of the divorce decree. Mr. Waugh complied with the dictates of this order by having the payments drafted from his bank account as they became due, up to the date of the parties’ divorce. No interest payment was due at the time of their divorce, and the April 2006 bill, submitted after the divorce, was an obligation of Ms. Waugh. The trial court’s use of the term “merged” does not vitiate its otherwise clear ruling that Mr. Waugh had complied with the *pendente lite* order. The trial court’s interpretation of its previous order is consistent with the plain meaning of the text. Further, we believe an award of attorney’s fees to Mr. Waugh is appropriate in light of paragraph 35 of the MDA and Ms. Waugh’s decision to prosecute this appeal. We accordingly affirm the judgment of the trial court and remand this matter for the calculation of Mr. Waugh’s reasonable expenses, including attorney’s fees, incurred in connection with

the contempt proceedings below and with this appeal. The costs of this appeal are also taxed against Ms. Waugh and her surety, for which execution shall issue if necessary.

DAVID R. FARMER, JUDGE